HAMZAH ATAN

v.

PERBADANAN JOHOR

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL APPEAL NO: 12-28-1998]
11 NOVEMBER 1998

CIVIL PROCEDURE: *Default judgment - Setting aside, grounds for - Procedural impropriety - Whether judgment was bad and irregular as it was given on account of appellant's absence - Whether application to set aside judgment under O. 28 r. 8 of the SCR 1980 must show merits to defence*

CIVIL PROCEDURE: *Default judgment - Setting aside, application for - Whether right course of action by appellant - SCR 1980, O. 28 r. 8*

In this instance, the appellant appealed against the default judgment obtained by the respondent in the trial court against him. This was pursuant to the respondent's claim for some arrears of rentals owed to it by the appellant under a tenancy agreement. The appellant alleged that the trial court had given the said judgment to the respondent for the simple reason that the appellant was absent on the day of the hearing. The appellant filed a notice of application under O. 28 r. 8 of the Subordinate Courts Rules 1980 ('SCR') to set aside the order of the trial court. The respondent argued that the affidavit-in-support of the application under the said order of the SCR did not show nor point positively to the merits of the defence.

Held:

[1] By filing the notice of application under O. 28 r. 8(1) of the SCR, the appellant adopted the right course of action. It was wrong to say that the appellant should have appealed against the decision of the trial court as the SCR provides for the correct remedy to follow. That remedy was to file the notice of application as was religiously followed by the appellant to the letter.

[2] There was procedural impropriety on the part of the trial court when it gave judgment to the respondent on account of the absence of the appellant at the trial. The trial court should have proceeded with the trial instead of giving judgment in default.

[3] A bare averment that there was a defence on the merits is not sufficient to show a defence on the merits. The affidavit must state the facts showing a defence on the merits.

[3a] Of pertinence would be the averment by the appellant and this was conveniently overlooked by the trial court when the appellant laid stress that the trial court had conducted "PRE-TRIAL CONFERENCE" on three occassions. If it was true that there were pre-trial conferences on three occassions surely the judge therein had the knowledge before her and could easily conclude that there were merits to the defence. Incidentally, pre-trial conference is not provided for under the SCR. The pleadings clearly showed that there was a *prima facie* defence to the respondent's claim. Further, the appellant did explain why he was absent in court at 9 am on that day.

[4] The default judgment given against the appellant was set aside as it was bad and irregular.

[Case remitted to same trial court for hearing.]

Cases referred to:
Bank Bumiputra Malaysia Bhd v. Majlis Amanah Ra'ayat [1979] 1 MLJ 23 ***(refd)***
Evans v. Bartlam [1937] AC 473 ***(refd)***
Gan Boon Kyee v. Yap Hong Sin & Anor [1997] 3 CLJ 822 ***(refd)***
Gan Kim Kiat & Bros. Realty Sdn Bhd v. Leang Ah Kan [1983] 1 CLJ 298 ***(refd)***
Lee Ah Kong v. Leong Koo [1996] 2 MLJ 229 ***(dist)***
Permalu a/l Vyrapan v. G Papathi d/o Govindasamy [1994] 3 CLJ 484 ***(refd)***
Perwira Habib Bank Malaysia Berhad v. Yap Yeng Seng [1989] 1 CLJ 1101 ***(refd)***
Retnam Pillai v. Bahagia Trading Agency [1977] 1 MLJ 127 ***(refd)***
Seng Huat Hang Sdn Bhd v. Chee Seng & Co Sdn Bhd [1986] 1 MLJ 348 ***(refd)***
Shaharuddin bin Abdul Rahman v. Satisah Ismail Sdn Bhd [1982] 1 CLJ 261 ***(refd)***
Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 ***(refd)***

Legislation referred to:
Subordinate Courts Rules 1950, O. 36 r. 9, (1)
Subordinate Courts Rules 1980, O. 28 r. 8, (1)

For the appellant - Vijayaletchumi Gopal; M/s Vijaya Gopal & Assoc
For the respondent - Jeyakumar Sundralingam; M/s Reginald Vallipuram & Co

Reported by Kavitha Gunasegaran & Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

By an agreement in writing dated 4 May 1994 made between the respondent on the one part and the appellant on the other part, the respondent let and the appellant took a part or portion of a car park area measuring approximately 2,000 sq. feet at a monthly rental of RM5,250 payable in advance for the period from 1 September 1993 to 31 August 1994. By cl. 3.1 of the tenancy agreement, under the heading art. III - agreement for tenancy it was provided that:

(a) the said tenancy shall expire on 31 August 1994;

(b) the said tenancy was subject to an option of renewal for a further period of one year, that was from 1 September 1994 to 31 August 1995;

(c) before the expiry of the said tenancy, the appellant should give to the respondent three months notice in writing of the appellant's intention to exercise the said option.

Pursuant to cl. 1 of the tenancy agreement under the heading art. V1 - Mutual Covenants, the appellant paid a sum of RM9,000 being deposit to the respondent. The tenancy agreement expired on 31 August 1994 since the appellant did not exercise an option to renew the tenancy agreement. Notwithstanding the expiry of the tenancy agreement, the respondent failed, refused, neglected to refund the deposit of RM9,000.

By letter dated 5 September 1994, the respondent offered to the appellant a tenancy for a further period of one year from 1 September 1994 to 31 August 1995 at a monthly rental of RM5,250. In that letter of offer it was provided that in the event the respondent's offer was accepted by the appellant, then the latter should pay and settle the amount as referred to in item six within 14 days from the date of receipt of that letter of offer. It was also provided in that letter of offer that in the event the appellant failed to accept the offer within 14 days then the said offer would lapse. It was said that the appellant did not accept the offer of tenancy by the respondent for a further period of one year beginning from 1 September 1994 to 31 August 1995. The appellant denied that he was indebted to the respondent in the sum of RM42,000 as stated in the statement of claim. It was the appellant's stand that the respondent's claim was misconceived, untenable in law and should be dismissed with costs. In the circumstances, the appellant counterclaimed for the refund of the sum of RM9,000, interest at the rate of 8% per annum from

the date of judgment to the date of payment or realisation, further or other relief and costs. All these facts can be seen in the appellant's statement of defence and counterclaim.

The respondent's case as seen from the statement of claim was simple and straightforward. By way of a letter of offer dated 5 September 1994, a part or a portion of that car park was let to the appellant for one year commencing from 1 September 1994 on a monthly basis at a monthly rental of RM5,250. Upon expiry of the one year tenancy, the rental continued on a monthly basis at the rate of RM5,250 per month. The respondent's claim against the appellant amounted to RM42,000 that constituted arrears of rentals from the month of May 1995 to December 1995. The respondent demanded payment but the appellant refused to pay and consequently the respondent claimed for the sum of RM42,000, interest at the rate of 8% per annum from the issuance of the summons till the date of payment and costs.

The respondent's defence to the counterclaim was short and sweet. It adverted to the fact that the appellant continued to remain on a part or a portion of that car park, consequently, the monthly rental at the rate of RM5,250 continued indefinitely. The respondent relied on two letters emanating from the appellant dated 5 August 1995 and 17 April 1996 respectively to support the respondent's version of continued tenancy. Flowing from this, the respondent prayed that the counterclaim be dismissed with costs.

These were the brief facts and it was on that basis that the appeal proceeded upon.

Now, it was common ground that on 27 April 1998 the case was scheduled for hearing before the Sessions Court (2) ("trial court") at Johor Bahru and on that date the respondent and their counsel together with their witnesses attended court, while the appellant was absent but the appellant's counsel was present. The trial court proceeded on a course of action that drew adverse comments from the appellant's counsel. It was said that instead of proceeding with the trial, the trial court gave judgment to the respondent for the simple reason that the appellant was absent on the day of the hearing. The appellant promptly filed, on 2 May 1998, a notice of application under O. 28 r. 8 of the Subordinate Courts Rules 1980 ("SCR") to set aside the order of the trial court. Order 28 r. 8(1) of the SCR was heavily relied upon by Madam Vijayaletchumi Gopal ("Gopal") and for brevity that order must be reproduced and it is worded as follows:

> 8. (1) Any judgment or order obtained where one party does not appear at the hearing may be set aside by the Court, on the application of that party, on such terms as it thinks just.

By filing the notice of application under O. 28 r. 8(1) of the SCR the appellant adopted the right course of action. It was wrong to say that the appellant should have appealed against the decision of the trial court dated 27 April 1998 as the SCR provides for the correct remedy to follow. That remedy was to file the notice of application as was religiously followed by the appellant to the letter. The case of *Shaharuddin bin Abdul Rahman v. Satisah Ismail Sdn Bhd* [1982] 1 CLJ 261; [1982] 2 MLJ 79 was a case where the matter was fixed for hearing on 4 July 1981 and the plaintiffs' representative was present together with their counsel whereas the defendant was absent but his counsel was present. The magistrate then gave judgment against the defendant by default. Ajaib Singh J held that that default judgment was bad and irregular and remitted the case to the magistrate for hearing.

This was what his Lordship said (at pp. 79 and 80 of the report):

> It is true that the defendant himself was absent when the case was called up for hearing but as his counsel was present the learned magistrate was not empowered to invoke rule 6 (1)(a) of Order 28 and give judgment by default. If the learned magistrate was not inclined to exercise his discretion in favour of granting an adjournment he ought to have proceeded to hear and determine the action in the normal manner which meant that the plaintiffs had to prove their case by adducing sufficient evidence and their witnesses would have been subject to cross-examination by the defendant's counsel who would also have had the right to call witnesses for the defence and to make a submission to the court at the end of the hearing. Similarly if the plaintiff is absent but his counsel is present when an action is called on for hearing the court cannot just dismiss the action but must allow the plaintiff's counsel to present his case and call witnesses if he has any in support.

It appears that on the authority of *Shaharuddin bin Abdul Rahman v. Satisah Ismail Sdn Bhd [supra]*, the default judgment entered by the trial court against the appellant should be regarded as bad and irregular.

Gan Kim Kiat & Bros. Realty Sdn Bhd v. Leang Ah Kan [1983] 1 CLJ 298; [1983] 1 MLJ 351 is another interesting case and the facts there may be stated as follows. On 7 May 1982, the Tampin Magistrate's Court Civil Action No: 43 of 1981 came up for hearing before the learned magistrate. The defendants' solicitor and his clients were present while the plaintiff's solicitor and his client were absent. The learned magistrate ordered that the action by the plaintiff be struck off. Prior to this, the solicitor for the plaintiff had applied for a postponement by letter on medical grounds, asking the court to excuse his absence later, but not the absence of his client. Having been so advised, the learned magistrate felt, no doubt, he was entitled to strike out the case. The solicitor for the plaintiff duly applied to the learned magistrate for the

reinstatement of the above case. In his affidavit filed in support, he stated that the plaintiff's absence in court on 7 May 1982 was due to his mistake in advising the plaintiff that the latter need not be present in court on 7 May 1982. The learned magistrate then made the order reinstating the case for hearing on 19 July 1982. The defendants then appealed against the order of reinstatement. Peh Swee Chin J (as he then was) in inimitable style had this to say (see pp. 352 to 353 of the report):

> The first point is as to what happens when a case is called up when certain parties are absent. Order 28 rule 5(1) applies to the case, are absent, and the court has a discretion to strike out the case, without prejudice to its restoration. When a case is so struck out, then, it does not involve, in my view, a judgment in default for a plaintiff, nor an order dismissing the claim with costs of the plaintiff in favour of a defendant. It means that the case is struck out of the list of hearing for that day. What then is required to be done by restoration, commonly referred to in practice as reinstatement? Surprisingly enough, there is a dearth of authority on this, but in my view, any request or application for restoration should normally be granted readily by the court unless the absence of the plaintiff was either intentional or contumacious.
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> Order 28 rule 5 mentioned above would not apply to the facts of the instant matter for the solicitor for defendants/appellants and his clients were present on 7.5.82 while the plaintiff and his solicitor were absent. The proper order in this case, on 7.5.82, apart from an adjournment, should have been, when the absence of solicitor was not excused or not previously excused, an order dismissing the plaintiff's claim with costs.
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> The second point I wish to stress is that in a civil case, unlike a criminal case, a litigant can always be represented by his solicitor who is a duly authorised agent for a plaintiff or a defendant. Such being the case, that when a civil case, it follows, comes up for hearing as fixed, the solicitor can be present without his client. If the solicitor is present, and his client is absent, then no court can give judgment (e.g. for a liquidated demand) in default of appearance, when the solicitor's client is defendant or dismiss the claim with costs when the solicitor's client is plaintiff. If the court orders the case to proceed to trial, when a solicitor is present but without his client, then it merely means, in practical terms, that the said solicitor is deprived of a possibly most important and material witness. It follows that, when the absence of a solicitor in any case is excused and a postponement is granted, a court must also excuse the absence of his client.
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> Having regard to what is stated above, the solicitor for the plaintiff/ respondent was in error when, requesting for a postponement, he asked the learned Magistrate to excuse his absence, but not the absence of his client, he thereby

unwittingly, misled the learned Magistrate into making the order of striking out the case in the first place.

The learned Magistrate was in error when in approving the application by the plaintiff's solicitor for postponement of the case he struck out the case at the same time for he should have adjourned the case to another date, and disregarded the absence of the plaintiff/respondent. If he had refused a request for adjournment, (which he did not), then he should have dismissed the action with costs instead of striking out the action.

The learned Magistrate had treated the case on the basis that he had dismissed the claim of the plaintiff/ respondent in default of appearance, for in his grounds, he stated that he was satisfied with the due cause shown for absence and the good cause of action of the plaintiff. I cannot find anything wrong with the basis or materials before him for him to be so satisfied, subject to what I have to say in a moment.

Under the Subordinate Courts Rules, 1980, the procedure and practice of applying to set aside a judgment in default of appearance in the subordinate courts have been brought in line with those in the High Court so that the requirement of 'good reason for absence be shown' mentioned in the repealed Subordinate Courts Rules, 1950, is no longer insisted on as a prerequisite, together with the usual affidavit of merits in an application to set aside judgment or order made in default of appearance.

In the circumstances of this case, I therefore dismiss the appeal with no order as to costs in this appeal but that the plaintiff/respondent shall pay all the costs thrown away on 7.5.82 and all costs of application for 'reinstatement' dated 28.6.82. I further direct that Tampin Magistrate's Court Civil Action No. 43 of 1981 be fixed for hearing early.

Yet another case would be *Retnam Pillai v. Bahagia Trading Agency* [1977] 1 MLJ 127. The appellant there had failed to file a defence to the respondents' liquidated claim for goods sold and delivered in the sum of $1,471.25. On the first date for mention, the appellant's application to file the defence was allowed and on the second date, the respondents agreed to the appellant's request for time to settle the matter. On the third occasion the appellant again requested for time and this request was granted as the final one. On the last date again the appellant had failed either to settle the matter or to file the defence. The learned magistrate then entered judgment against the appellant, who was present in court at the material time. The appellant appealed against the decision of the learned magistrate who refused the application of the appellant to set aside the magistrate's own judgment and to order the case reinstated for hearing. The learned magistrate contended that the judgment was entered *inter partes* hence he had no power to set it aside and the appellant's

remedy was to appeal against the judgment. In dismissing the appeal, the High Court held that the intention of the legislature in cases of *inter partes* judgment would be that the setting aside of the said judgment should be by way of an appeal. The High Court too held that the appellant, in his application to set aside the judgment of the magistrate, had failed to base his application on the irregularities of the proceedings. The High Court also held that the judgment was irregular but by virtue of O. 36 r. 9 of the Subordinate Courts Rules 1950 it will not render the proceedings void unless the court shall so order. The power, so the High Court held, to set aside any irregular proceedings under r. 9(1) appears to be confined only to proceedings but not to the judgment already entered. Mohamed Zahir J delivering the judgment of the court had this to say (see pp. 128 and 129 of the report):

> Anyway the learned magistrate in dismissing the application by the appellant to set aside his own judgment contended that the judgment was entered *inter partes* hence he had no power to set it aside and the appellant's remedy was to appeal against the judgment.
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> Mr. Periasamy counsel for the appellant argued that the learned magistrate had the powers to set aside his own judgment if such judgment was obtained by default of defence. He also argued that there was no provision in the Subordinate Courts Rules for setting aside judgments in default of defence and where the defendant was present at the time of the judgment although the Rules, as he contended, expressly provided the procedure for setting aside judgment in cases of default of appearance. Counsel therefore submitted that that being the case the Rules of the Supreme Court be adopted [Order 1, rule 2 of the Subordinate Courts Rules].
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> Now, before we go further, we have to examine whether the Subordinate Courts Rules do not have any procedure for setting aside any judgment in default of defence and where the defendant was present at the time of judgment. Obviously under the Rules there is no such procedure. And this leads to another question whether it is the intention of the legislature not to allow setting aside *inter partes* judgment by the same subordinate court and that the procedure intended to be is by way of appeal.
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> On examining the Rules closely I am of the opinion that it is the intention of the legislature that in cases of *inter partes* judgment the setting aside of the said judgment should be by way of appeal. My reason for saying so is that the rules expressly provide the procedure for setting aside by the magistrate under Order 19 rule 3(3) in cases of default of appearance but no such provision is made under the following rule 4 in cases of undefended actions. My view is that this omission is not inadvertence and the intention is that the defendant should set aside the judgment by way of appeal. My view is further

fortified after examining Order 36 rule 14 which sets out the procedure where a defendant is precluded from defending an action. Rule 14(b) and (d) reads as follows:-

> If in any action it is ordered that a defendant be precluded from defending -
>
> (a) x x x
>
> (b) he should be permitted to attend the trial of the action, but not to take any part therein.
>
> (c) x x x
>
> (d) for the purpose of any appeal or further proceedings the judgment shall be deemed to have been given *inter partes*.

Even the decided cases cited in this appeal, *Abdul Majeed v. Boor Singh* [1970] 2 MLJ 4 and *Leow Boke Chooi v. Asia Motor Co. Ltd* [1967] 2 MLJ 109, were actually appeals from the substantive judgment of the magistrate. Obviously the judgment in the instant case was irregular but by virtue of Order 36 rule 9 it will not render the proceedings void unless the court shall so order. The power to set aside any irregular proceedings under rule 9(1) appears to be confined only to proceedings but not to the judgment already entered.

Even if I were wrong in holding that the magistrate does not have power to set aside his own judgment in such cases, this appeal cannot succeed on another ground. In making the application to set aside the judgment of the magistrate the appellant had failed to base his application on the irregularities of the proceedings. He however based his application on his having a good defence and that the case had been referred to arbitration.

In the appeal before me a fresh point of law that is the irregularities of the proceedings was raised in addition to the other two grounds. In this respect I would quote the case of *Rengasamy Pillai v. Comptroller of Income tax* [1970] 1 MLJ 234 wherein Lord Diplock stated *inter alia* -

> As has been repeatedly stated it is not the practice of their Lordships, save in very exceptional cases, to allow a fresh point of law to be argued without the benefit of the judgment in the court below ....

Accordingly I dismissed this appeal with costs. I also ordered the deposit of $150 made by the appellant in this appeal to be paid to the respondents as part of the costs.

Recently the Court of Appeal in *Gan Boon Kyee v. Yap Hong Sin & Anor* [1997] 3 CLJ 822 had to consider whether the order of the learned judicial commissioner after consideration of the evidence but in the absence of the appellant was a default judgment. The brief facts of that case may be stated thus. In the court below, the respondents had taken out a summons where they applied for a certain declaration against the appellant and some others. The appellant and the other defendants had all entered appearance, and had also exchanged affidavits before the return date of the summons. The appellant and his counsel, however, were absent when the matter was being called, and the learned judicial commissioner, having heard the submissions and the evidence of the parties who were present, granted the declaration sought for. The appellant was lackadaisical and did nothing for about five months after becoming aware of the declaratory order and later applied for an extension of time and a stay of the order. The learned judicial commissioner rejected the application and hence the appeal to the Court of Appeal. Gopal Sri Ram JCA delivering the judgment of the Court of Appeal had this to say (see pp. 825 and 826 of the report):

> I have read the judgment of the learned Judicial Commissioner with great care, bearing in mind that this is not the case of an ordinary judgment in default but one of declaratory relief. As observed by Zamir & Woolf, on '*The Declaratory Judgment*' (2nd Edn.) at page 264:
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> > ... Courts will generally be reluctant to grant a declaration as part of a default judgment in the absence of any evidence and argument. Before the Court grants a declaration it wants to be sure, as in the case of an injunction, that it is appropriate to grant that relief.
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> As I earlier observed, the order dated 5 May 1993 makes it clear that the declaratory relief sought for in this case was not granted in default but after consideration of evidence and argument. I am therefore in agreement with the learned judicial commissioner in her observation that this was not a judgment in default.
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> Further, she was entirely correct in classifying the conduct of the instant appellant as 'leisurely paced' because of the sluggish pace at which the appellant moved the Court. It is axiomatic that the law assists the vigilant and not the indolent.
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> At the end of the day it all boils down to whether the learned Judicial Commissioner exercised her discretion correctly. In my judgment she did. She took into account all relevant considerations; she directed herself correctly on the law; she asked herself the right question, and her decision accords with the justice of the case.

I am entirely unconvinced with the arguments in support of this appeal. I would therefore dismiss the appeal with costs and affirm the order of the learned Judicial Commissioner. By consent of Counsel before us, the costs of this appeal is fixed at RM1,000.00.

The deposit paid into Court by the appellant shall be paid out to the respondent to account of his fixed costs.

Yet another interesting case would be the case of *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241; [1996] 1 MLJ 30, an equally recent decision of the Federal Court. The headnote to the case provides ample reference material and there it was stated as follows:

On 8 July 1988, Arab-Malaysian Finance Bhd ['the respondent'] entered a judgment in default of appearance against one of its borrowers ['the appellant'] for the sum of RM4,923,242.69 with interest 'at 1% above the prescribed rate ... on a daily rests ...'. The appellant filed an application to set aside the judgment on the ground that it was irregularly obtained, as it is provided under Order 83 rule 4(1) of the Rules of the High Court, 1980, that in a charge action begun by writ, judgment in default of appearance shall not be entered except with the leave of the court. The senior assistant registrar '[SAR'] decided in favour of the appellant, and set aside the default judgment. Dissatisfied, the respondent appealed to the judge in chambers. At the hearing, the appellant further contended that the default judgment was uncertain, as although the words 'prescribed rate of interest' ['the words'] were mentioned in the judgment, it was not defined therein, and therefore, the appellant would not be able to ascertain the amount which he was legally liable to pay ['the appellant's contention']. The judge allowed the respondent's appeal on the grounds that: (i) there was no question of a contravention of Order 83 rule 4(1), as the respondent's action against the appellant was not a charge action; (ii) the court could not consider the appellant's contention, as it had not been raised before the SAR; (iii) the defects in the judgment could be cured in any event, as the words were clearly defined in the appellant's loan agreement; and (iv) there was an inordinate delay on the part of the appellant in filing the application to set aside the default judgment. The trial judge also ruled that the judgment in this case was similar to a consent judgment, and thus, the appellant should bring the matter within the terms on which a consent judgment could be set aside in order to succeed in setting aside the default judgment. The judge then proceeded to restore the default judgment, after deleting the words 'daily rests basis' from it, even though this application of the respondent was not before him for disposal, and neither counsel was heard on the merits. The appellant appealed.

Held, allowing the appeal:

(1) It is elementary that an irregular judgment is one which has been entered otherwise than in strict compliance with the rules or some statute, or is

entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity. The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae*, that is to say, irrespective of the merits and without terms. However, the application to set aside such a judgment should be made: (i) with reasonable promptitude; and (ii) before the defendant has taken any fresh step after becoming aware of the irregularity (see page 36B-D).

(2) In appeals to a judge in chambers from the decision of a registrar of the High Court, the judge is not exercising appellant jurisdiction in the same sense as when he hears appeals from judgments, decisions or orders of the subordinate courts. The appeals from decisions of the registrar are by way of an actual rehearing and the judge treats the matter as though it comes before him for the first time. The judge is therefore not confined to the points taken before the registrar, so that the rule about new points being not generally open to an appellant to take on appeal does not apply. It follows that the judge in this case was wrong in refusing to consider the appellant's contention (see pages 36I and 37A-F); *Blundell v. Rimmer* [1971] 1 All ER 1072; [1971] 1 WLR 123 and *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 followed.

(3) Clearly, there had been procedural impropriety in the decision-making process of the judge, as neither counsel had had the opportunity of being heard, and on this ground alone, his judgment could not stand (see page 39D-E).

(4) The default judgment was still uncertain even though reference was made to the loan agreement to resolve the ambiguities therein. The appellant would still be perplexed as to the amount of interest he would have to pay under the default judgment in order to avoid enforcement proceedings, as the default judgment included an element of contractual interest at a fluctuating rate, and when such interest was to run depended upon the absolute discretion of the respondent. By reason of uncertainty, the default judgment was a nullity (see page 42C-D).

(5) It is clear law that the court still retains a discretion to set aside an irregular judgment despite long delay, provided it is satisfied that: (i) no one has suffered prejudice by reason of the appellant's delay; (ii) alternatively, where such prejudice has been sustained, it can be met by an appropriate order as to costs; or (iii) to let the judgment to stand would constitute an oppression (see page 42G-H) *Atwood v. Chichester* [1878] 3 QBD 722 and *Harley v. Samson* [1914] 30 TLR 450 followed.

(6) In this case, the delay was not fatal to the appellant's application since the default judgment was by reason of uncertainty, was nullity. Under the court's inherent jurisdiction to prevent abuse of its proceedings, the court has power to set aside the judgment in default, despite the appellant's application being out of time. (see pages 42I and 43A-C); *Beale v. McGregor* [1886] 2 TLR 311 followed.

(7) The default judgment was not a consent judgment as it was never alleged by the respondent that there has been any compromise or arrangement between the parties pursuant to which the default judgment had been entered (see page 44E); *Chandless-Chandless v. Nicholson* [1942] 2 KB 321, *Thorne v. Smith* [1947] KB 307; [1947] 1 All ER 39 and *Siebe Gorman & Co Ltd v. Pneupac Ltd* [1982] 1 All ER 377; [1982] 1 WLR 499 followed; *Bank Bumiputra Malaysia Bhd v. Kredin Sdn Bhd & Anor* [1989] 1 MLJ 323 overruled.

Now, was there "procedural impropriety" on the part of the trial court when she gave judgment to the respondent on account of the absence of the appellant at the trial. The answer would be in the positive. The trial court should have proceeded with the trial instead of giving judgment in default.

Mr. Jeyakumar Sundralingam argued strenously and it was his stand that the affidavit in support of the application under O. 28 r. 8 of the SCR did not show nor point positively to the merits of the defence. The trial court adopted a simplistic approach to the matter and said:

> I pause here to observe that the only paragraph in the defendant's affidavit (referring to the appellant) with regard to merits was an averment that he was verily advised that he had a good defence on the merits.

Of course as the law now stands, a bare averment that there was a defence on the merits is not sufficient to show a defence on the merits. The affidavit must state the facts showing a defence on the merits (*Bank Bumiputra Malaysia Bhd v. Majlis Amanah Ra'ayat* [1979] 1 MLJ 23 which was dutifully followed by *Perwira Habib Bank Malaysia Berhad v. Yap Yeng Seng* [1989] 1 CLJ 1101). The appellant in his affidavit explained that his car broke down on the day of the hearing and he contacted his lawyer's office and told the clerk that he could not arrive in court at 9.00 a.m. but he was told by that clerk that Madam Gopal had proceeded to court and could not be contacted. The appellant then deposed in his affidavit that he arrived at the court at 11.30 a.m. and could not trace Madam Gopal and he then proceeded to the lawyer's office (the office of Madam Gopal) and there he was told that the trial court had given a judgment against him on account of his absence in court. Of

pertinence would be the averment by the appellant and this was conveniently overlooked by the trial court when the appellant laid stress that the trial court had conducted "PRE-TRIAL CONFERENCE" on three occasions, namely: 26 July 1997, 16 August 1997, and 27 September 1997. If it was true that there were pre-trial conferences on three occasions surely the trial court had knowledge of the issues before her and could easily conclude that there were merits to the defence. Incidentally, pre-trial conference is not provided for under the SCR. The pleadings clearly show that there was *prima facie* defence to the respondent's claim (see *Seng Huat Hang Sdn Bhd v. Chee Seng & Co Sdn Bhd* [1986] 1 MLJ 348 which vigorously applied the decision of the House of Lords in *Evans v. Bartlam* [1937] AC 473).

The appellant did explain why he was absent in court at 9.00 a.m. on that day, a situation which was different from that of *Lee Ah Kong v. Leong Koo* [1996] 2 MLJ 229 CA, a decision of Mahadev Shankar JCA speaking for the Court of Appeal. There his Lordship had this to say at pp. 236 to 237 of the report:

> It is manifestly obvious that *Lee's* case is devoid of any prospect of success. In support of the first application made on 8 August 1990, Lee did not explain why he was absent and no merits were urged. We do not think it correct to say that the judgment given on 7 November 1990 was a 'default judgment'. Even though Lee had by his own conduct precluded himself from giving evidence at the trial the fact is that the decision given on 7 November 1990 was *inter partes* after counsel for both parties had fully argued their respective positions.
>
> In our view, the second application filed by Lee to set aside an alleged 'default judgment' was wholly misconceived. It was a misguided attempt to obtain a second bite at the cherry, and should have been struck out in limine especially as the first appeal was already pending. But in all the circumstances of this case, the point is one of academic interest.
>
> There are significant differences between procedure in the High Court and the subordinate courts. In the High Court, a defendant who is served merely enters an appearance and files a defence (or a defence and counterclaim) after he is served with a statement of claim. Judgments can be obtained in default of appearance or in default of defence. Once the pleadings are closed, evidence has to be led before judgment is obtained at the trial in the absence of the defendant.
>
> In the subordinate courts, however, the prescribed form of notice of appearance (Form 2, Order 5 rule 2) requires the defendant who has been served to state

whether he admits or disputes the claim, and by Order 14 rule 5 of the SCR, he can file and serve his defence before the return day or within such time as the court may direct on the return day.

Order 28 rule 6 of the SCR has been so worded as to give the court an option either to give a judgment in default of the presence of the defendant and his counsel (see *Shaharuddin bin Abdul Rahman v. Satisah Ismail Sdn Bhd* [1982] 2 MLJ 79) or to make any other order as it thinks just; which would include the power to require the plaintiff to give evidence in support of his claim before judgment is given. That the court can give a default judgment at the trial without requiring evidence can be seen when a comparison is made with Order 45 rules 5 and 6 which require leave of the court before a judgment is entered in default appearance. But whether it should do so under Order 28 rule 6 in a particular case calls for the exercise of a judicial discretion. In the present case, the sessions judge required evidence to be led. He did not give a default judgment. His refusal to reopen the case after he had reserved judgment was an exercise of discretion which was quite proper because on both counts Lee had failed to discharge the onus upon him namely to give a reasonable excuse in the first application for his absence, and to show merits.

In the light of what we have said, this appeal is dismissed with costs. The deposit will be paid out to the respondent towards her taxed costs.

Another interesting case would be *Permalu a/l Vyrapan v. G. Papathi d/o Govindasamy* [1994] 3 CLJ 484, a decision of Vincent Ng Kim Khoay J. The facts of that case may be stated as follows. After a number of postponements the plaintiff's suit was fixed for hearing on 8 December 1993. Both the parties were notified through their counsel by way of a notice of trial dated October, 1993. On 7 December 1993, the plaintiff's counsel wrote in requesting for a postponement on the grounds that the counsel would be on leave on the hearing date. On the day fixed for hearing, the defendant, her counsel and her witnesses were present in court. The plaintiff was present in person but his counsel was absent. The learned judge gave the plaintiff an opportunity to conduct his own case in the absence of his counsel. Upon being informed by the plaintiff that he did not wish to conduct his own case, the learned judge dismissed the plaintiff's suit with costs. On the plaintiff's application to set aside the order of the learned judge, the defendant raised a preliminary objection on the procedure adopted by the plaintiff and contended that as the order of court dated 8 December 1993 was an *inter partes* order, the plaintiff should have appealed against the said order. The plaintiff on the other hand contended that as the case was not heard on its merits, the court has an inherent jurisdiction to set aside its own orders and argued that the question of appeal did not arise. His Lordship Vincent Ng Kim Khoay J had this to

say at pp. 486 to 487 of the report:

> The Court's determination on the preliminary objection concerning procedure adopted by the plaintiff would largely turn on its construction of Order 35 rule 1(2) of the RHC which states that:
>
> > If, when the trial of an action is called on, one party does not appear, the Judge may proceed with the trial of the action or any counterclaim in the absence of that party.
>
> and Order 35 rule 2(1) which states that:
>
> > Any judgment or order obtained where one party does not appear at the trial may be set aside by the Court, on the application of that party, on such terms as it thinks just.
>
> I am of the considered opinion that as the rules expressly provide for the setting aside of a judgment or order made by the Court in cases where one party does not appear at the trial, whereas there is no such provision where both parties appear but one of them is unable to proceed (e.g. on the grounds that he does not have the assistance of his Counsel), and as it is not an omission due to inadvertence, it becomes evident that it is the intention of the Legislature that in cases of an *inter-partes* judgment or order, the setting aside of same should be by way of an appeal. As such, on examining Order 35 of RHC closely I was constrained to hold that this provision could not be invoked to assist the plaintiff in his current application as I was also of the view that the order of Court dated 12 December 1993 was an order made *inter-partes*, despite the absence of the plaintiff's Counsel. The expression 'one party' in Order 35 rule 2(1) should be taken in its plain literal meaning and should not be read as 'one party with his Counsel.' To say that the word 'party' encompasses also his Counsel would create an absurdity as Counsel is never a party to an action unless he is made a party in the action. We are aware that it is not entirely uncommon for plaintiffs or defendants to conduct their own cases in Court; Counsels are engaged only to assist the party to conduct cases due to the former's expertise. The fact that his Lordship Mohd Nor had allowed the plaintiff to present his case and to adduce evidence (and the plaintiff's refusal to do so) would by itself constitute a complete answer to Mr. Darshan Singh's contention that it was not an order made *inter-partes* for being devoid of a trial.
>
> In the event, I upheld the defendant's preliminary procedural objection and dismissed the plaintiff's application under enclosure 39 with costs to the defendant.

His Lordship then continued in serious vein at pp. 487 to 488 of the report in these words:

The approach that courts may adopt when faced with the problem such as in the instant case is as follows:

> If plaintiff is present but not defendant then judgment could be recorded for the plaintiff but only after the latter has adduced some evidence in support of his claim. (See *Retnam Pillai [ibid]*). In the event that both parties are present whereas the plaintiff is present without his Counsel, the Court should first ascertain whether the plaintiff wished to have his case heard (and if so, to adduce evidence to support his claim). And if the plaintiff then declines to do so the Court may dismiss the plaintiff's claim - see *Loh Shan Wah v. Loh Kong Imm* [1931] 7 FMSLR 238, C.A. On the other hand, if the plaintiff does not appear but the defendant is present at the trial and ready to proceed then the defendant is entitled to judgment dismissing the claim, and he may then proceed to prove his counterclaim if any. See *Armour v. Bate* [1891] 2 QB 23.
>
> In the present case both the parties were present but the plaintiff was present without his Counsel. Even if the plaintiff's application could be brought within the ambit of Order 35 rule 2(1) (which I have earlier ruled against the plaintiff), it would still be at the discretion of the Court - as conceded by the plaintiff's Counsel – whether to set aside the order of 8 December 1993. This Court would nevertheless have declined to exercise its discretion in the plaintiff's favour after having carefully considered the circumstances of the case and for the following reasons:
>
> This suit had been long outstanding, wherein the alleged cause of action had arisen as early as September 1982 which resulted in the claim being filed on 12 March 1985. The notice of trial was served on the plaintiff's Counsel some time around 18 October 1993, yet it was only at the eleventh hour, in the afternoon of 7 December 1993, that the plaintiff's Counsel wrote to the Court to say that he 'would be on leave' for two days, on 7 and 8 December 1993. The trial Judge had given ample opportunity for the plaintiff to contact his Counsel by standing down the matter for 20 minutes. Counsel for the plaintiff was neither on sick leave nor on emergency leave but merely 'on leave'. Yet, he did not even have the courtesy to get another lawyer to mention on his behalf on 8 December 1993; and indeed, as the letter was dated and signed 7 December 1993 it would appear that he was working in his office on 7 December 1993, while he was supposed to be 'on leave'. This itself showed a contumelious conduct, disrespectful of Court, such as would bring it somewhat within the ambit of the principles expressed in the dictum of Salleh Abas F.J. in the case of *Toh Hock Thye & Ors v. Toh Chwee Biow* [1982] 1 MLJ 152. Therein it was held that the failure to explain, through non-attendance on a show cause notice as to why the action should not be dismissed for want of prosecution, was nothing but an intentional and contumelious act disrespectful of the Court.

Before making the order of 8 December 1993 the presiding Judge had carried out the procedures required of him by standing down the matter for 20 minutes. Most importantly, by having given the plaintiff the opportunity to conduct his own case in the absence of his Counsel, after informing him that he would not grant a postponement of the case in the circumstances, the impact of the plaintiff's contention – that it was not an *inter-partes* order as the Judge had decided without considering the merits of the claim or upon evidence led - had been completely negated.

Any sympathies for the plaintiff in his current predicament would grossly be misplaced and it would encourage an indolent party or a party who intends to delay proceedings to seek last minute adjournments on the ground that his Counsel is on leave. Be it noted that postponements are granted as a matter of grace or on sufference of the Courts but not by (litigant's) right. The Courts ought not, so readily, to overlook the fact that, by retaining a particular lawyer among so many, a litigant has thereby signalled to the Court the trust and confidence he has reposed on that lawyer to conduct the prosecution of his case responsibly and with the expected competency; thus the litigant should be left by himself to seek remedy against his own lawyer should the latter be found wanting on this score. Such a litigant should not be coddled by the Court in the name of justice.

For the above further reasons the plaintiff's application herein would in any event, on its merits, also have been dismissed with costs to the defendant.

The approach taken by me and Mohd Nor bin Haji Abdullah J.C. (as he then was) in this case may appear to be somewhat drastic, but it is nevertheless wholly consistent with the dictates of the current conditions of our Courts in terms of backlog of cases; and, in this case, no doubt amply contributed to by the nonchalant conduct of Counsel to the Court. In this application for reinstatement, even if the plaintiff had succeeded on the preliminary issue, I would nevertheless have decided not to exercise my discretion for the compelling reasons aforesaid, yet I am mindful that essentially the exercise of such discretion has to be decided upon the individual merits of each application.

For the reasons adumbrated above, I set aside the default judgment given against the appellant on 27 April 1998 as it was bad and irregular. The case should be remitted to the same trial court for hearing.